

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

Scott Malcolm and Tim McGough,

Civil No. 05-2099 (JRT/FLN)

Plaintiffs,

v.

**REPORT AND  
RECOMMENDATION**

Vertical Horizon, Inc., Vertical Horizon  
Construction LLC and Michael Shawn Lowery,

Defendants.

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Pamela H. Nissen for Plaintiffs  
Jean B. Roth for Defendants  
Michael Shawn Lowery on behalf of himself.

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**I. REPORT**

On May 24, 2007, the Court issued an Order [#44] granting Plaintiff's motion for summary judgment on their claims for unpaid fringe benefit contributions and damages. The Court denied Plaintiff's motion for summary judgment on Defendant's counter-claim for an accounting. Instead, the Court ordered the Plaintiffs to provide an accounting by July 23, 2007. The Court recognized that Defendant's request for an accounting is closely tied to Plaintiff's claims for unpaid fringe benefit contributions and damages. Due to the interconnectedness, the Order [#44] stated that "the Court would consider granting defendants' leave to file a motion for reconsideration of this order if defendants later discover evidence sufficient to create a genuine issue of material fact on plaintiffs' claims for unpaid fringe benefit contributions and damages." After the accounting was provided on July 23, 2007, the parties were to issue a joint report by September 22, 2007, detailing the issues remaining in this case.

In response to the Court's Order [#44], Defendant Lowery filed a *pro se* Notice of Appeal

to the Eighth Circuit [#46]. Defendant Lowery's decision to file a *pro se* appeal prompted the law firm of Mansfield Tanick & Cohen to bring a Motion to Withdraw as Attorney [#53] for Defendants Vertical Horizon, Inc., Vertical Horizon Construction LLC and Michael Shawn Lowery. The motion to withdraw was based upon Defendant Lowery's decision to file a *pro se* appeal. On July 30, 2007, the undersigned held a hearing on the Motion to Withdraw as Attorney [#53]. The undersigned issued an Order [#64] taking the motion under advisement until a case management conference could be held. A case management conference was held on August 15, 2007. During the case management conference, it was determined that issues remain in this litigation and the Plaintiff needed to provide more information related to their accounting. The parties set forth a process to address the remaining issues. The parties were to report back to the Court on their progress by September 7, 2007. Immediately following the case management conference, the undersigned issued an Order [#66] denying the Motion to Withdraw as Attorney until the conclusion of the District Court proceedings.

Since the case management conference, the parties have filed a series of letters with the Court. On September 7, 2007, Defendant Lowery, in an affidavit to the Court [#68], reported that no further information had been provided by Plaintiffs relating to the accounting, nor any process implemented to resolve the remaining issues. On September 14, 2007, Plaintiffs, in a letter to the Court [#69], indicated that they have provided all documents in their possession and Defendants have not provided a specific objection to the documents provided or the specific documentation needed to complete the accounting. On September 18, 2007, Defendant Lowery, in a letter to the Court [#74], reported that still no further information had been provided by Plaintiffs relating to the accounting. Defendants also reference an alleged inconsistency in the information provided by Plaintiff. On September 21, 2007, Plaintiffs and Defendants' counsel, in a letter to the Court [#76],

reported that more time would be needed to provide an accounting and requested a sixty day extension to file the joint report on September 22, 2007.

## **II. RECOMMENDATION**

Based upon all the files, records and proceedings herein, **IT IS HEREBY RECOMMENDED** that this matter be referred back to the Magistrate Judge to conduct an evidentiary hearing to determine the amount of unpaid fringe benefit contributions. Following the evidentiary hearing, the Magistrate Judge will issue an additional Report and Recommendation detailing the amount of unpaid fringe benefit contributions.

DATED: September 26, 2007

s/ Franklin L. Noel  
FRANKLIN L. NOEL  
United States Magistrate Judge

Pursuant to the Local Rules, any party may object to this Report and Recommendation by filing with the Clerk of Court and serving on all parties, on or before **October 16, 2007**, written objections which specifically identify the portions of the proposed findings or recommendations to which objection is being made, and a brief in support thereof. A party may respond to the objecting party's brief within ten days after service thereof. All briefs filed under the rules shall be limited to 3500 words. A judge shall make a de novo determination of those portions to which objection is made.

This Report and Recommendation does not constitute an order or judgment of the District Court, and it is, therefore, not appealable to the Circuit Court of Appeals.